PRIVATIZING URBAN LAND USE REGULATION: THE PROBLEM OF CONSENT

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Zoning and similar governmental land use controls are pervasive in urban neighborhoods. These regulations conventionally are grounded in the police power and are deemed necessary to protect the health, safety, and welfare of the community as a whole. Skeptics long have doubted this account, however.[1] Among them is Robert Nelson,[2] whose present proposal to privatize urban land-use restrictions[3] asserts that the "actual purpose" of residential zoning is to establish a collective property right to exclude inferior uses from the neighborhood.[4] In effect, landowners willingly surrender exclusive control over their own parcels in exchange for a neighborhood veto on uses that would lower property values or otherwise might be objectionable.

Even if governmental regulation is a proxy for private advantage, implicit and indirect control mechanisms rarely work as well as more direct linkages. Thus, Nelson proposes a mechanism for the devolution of regulatory powers from planning boards and municipal legislatures to neighborhood groups, which I will call "urban neighborhood associations" (UNAs).[5] The creation of a given UNA and delineation of its powers would have to be approved by a neighborhood supermajority, but there would be no unanimity requirement.[6] The powers of UNAs would be vast

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1 *See, e.g.*, RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED (1985) (describing zoning as embodying political trading instead of professional planning); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) (describing suburban zoning as device to maximize the value of existing homes at the expense of owners of undeveloped land).

2 ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS (1977) (advocating devolution of local governmental functions); *see also* Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, *in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 45 (Advisory Comm'n on Intergovernmental Relations ed., 1989).

3 *See* Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999).

4 *See id.* at 839, 824-50.

5 Nelson uses the term "neighborhood associations" indistinguishably, but I want to contrast UNAs from the familiar Residential Community Associations (RCAs) created as an integral aspect of new suburban subdivisions.

6 I take the lack of a unanimity requirement to be the principal distinction between the UNA and the RCA, of which potential homebuyers in a particular subdivision are aware.

and might even encompass the equivalent of private condemnation of members' lands.[7]

Since UNAs would be formed by neighborhood vote, they are posited as being founded upon private contract. My purpose here, however, is to question whether non-unanimous privatization can be demonstrated to be efficient and whether it is "contractarian" in the sense of furthering individual liberty. One concern is that "privatization" that disregards the wishes of a minority of landowners marks not a termination of governmental controls, but rather the beginning of a new set of relationships that further insinuates government into the fabric of contractual choice. A second concern is that "privatization" will, in any event, prove partly illusory as the government responds to UNA initiatives.

I. AN OVERVIEW OF NEIGHBORHOOD PRIVATIZATION

In recent decades residential community associations (RCAs) have grown dramatically. In 1975, some 20,000 RCAs contained 2.0 million housing units (2.58% of the nation's housing stock). By 1990, some 130,000 RCAs contained 11.6 million units (11.4% of the housing stock). By 1998, there were over 200,000 RCAs encompassing some 16.4 million dwellings (14.7% of the housing stock.)[8] The proportion of housing units within RCAs is not uniform throughout the country. In some metropolitan areas, such as Los Angeles and San Diego, it exceeds seventy percent.[9] RCAs are established as governing bodies within the offering documents for lots in new subdivisions, so that every homebuyer agrees either to RCA powers or to assume the obligations of a seller who previously had agreed. In existing neighborhoods, on the other hand, landowners own their property free of such commitments. Nelson asserts that transaction costs make the creation of UNAs in existing neighborhoods prohibitive. For this reason, owners would not form them even where UNAs would confer a significant collective benefit.[10]

Nelson proposes that states circumvent this collective action problem[11] through legislation. Landowners would be permitted to apply for the creation of a UNA if their cumulative holdings in the geographic area they specified comprised sixty percent of the total value of the private property in that area. The state would have to certify that the proposed boundaries were reasonable with respect to compactness, geographical features, infrastructure, and other considerations.[12] If the application was

[7] *See* Nelson, *supra* note 3, at 835; *see also infra* text accompanying note 65.

[8] *See* COMMUNITY ASSOCIATIONS FACTBOOK 19 (Community Ass'ns Inst., 1999).

[9] *See* EVAN MCKENZIE, PRIVATOPIA 120 (1994).

[10] *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[11] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

[12] *See* Nelson, *supra* note 3, at 833.

approved, "the state would authorize a neighborhood committee to negotiate a service transfer agreement with the appropriate municipal government."[13] The agreement would specify the ownership of public facilities in the neighborhood, including streets and parks, and would allocate the responsibility for future provision of services like fire and police protection and trash collection. It also would specify "future tax arrangements."[14]

During the year following the submission of a plan, the state would supervise a process by which residents would be informed of the plan and would discuss its contents. Approval of the plan in the ensuing election would require affirmative votes representing (1) ninety percent of the "total value of the proposed neighborhood;" and (2) seventy-five percent of the "individual unit owners."[15] If approved, all owners would be required to join the neighborhood association and would be subject to all of its terms.[16]

Once in place, the UNA could regulate the "fine details" of neighborhood aesthetics that are generally uncontrolled by zoning and would be better left to neighborhood residents.[17] It would provide services to residents more efficiently. Since the gain from UNA activities would inure to residents, they would no longer "typically resist almost all land use change."[18] The UNA's powers would be so extensive as to permit the most profound changes:

> Moreover, because zoning is a form of public regulation, the direct sale of zoning is not considered permissible (it would be "bribery"). However, if the exclusion of a use was an ordinary exercise of a private property right, neighborhoods could sell rights of entry (say for a new neighborhood convenience store) into the neighborhood, sell rights to make certain broader changes in land use within the neighborhood, or even sell all the neighborhood property in one package for comprehensive redevelopment. The private neighborhood's ability to put rights of entry into the neighborhood in the market system would introduce greater flexibility in metropolitan land markets, significantly improving the efficiency of their operation.[19]

The Nelsonian UNA thus derives its extensive powers from conflating individual property rights and governmental land use controls, and from discarding the need for unanimous consent.

II. THE CONFLATION OF PROPERTY RIGHTS AND ZONING INTO "COLLECTIVE PROPERTY"

Reflecting Nelson's earlier work, William Fischel has noted:

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13 *Id.* at 834.

14 *Id.*

15 *Id.*

16 *See id.*

17 *Id.* at 835.

18 *Id.* at 836.

19 *Id.* at 835.

> [Z]oning should be thought of as a collective property right . . . . The problem with this approach is that there is no law that simply grants property rights in land to the community authorities. Zoning evolved without any conscious decision to reassign ownership of property.[20]

Zoning is an application of the state's police power. Property and the police power have had a long and inextricable relationship in which each has been constrained by the other, but in which neither has been superior to or easily transmutable into the other. Whether zoning "should" be viewed as the property right of dominant local coalitions ultimately depends upon our view of the proper role of the individual and of the state.

A. *The Nature of Property Rights*

Some ascribe to private property a natural law basis, stressing theories of private ownership associated with John Locke.[21] Others emphasize a "civic republican" heritage in which individual property rights are subordinated to the need for civic virtue.[22] In neither tradition are the rights of individual landowners subordinate to or mediated by quasi-private organizations. Furthermore, although relatively few English landowners held land under a tenurial relationship with the Crown, in the American colonies land was abundant and labor was not. From the beginning, colonial governments granted land titles in fee simple.[23]

Likewise, the evolution of the common law has stressed the coexistence of individual property rights and the enhancement of the wealth of the community.[24] The law of nuisance, for instance, prohibits owners from using their lands so as to interfere with the reasonable use of neighboring

20 WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS 21 (1985) (citing NELSON, *supra* note 2).

21 *See, e.g.*, Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 369 (1991); *see also* HENRY S. COMMAGER, JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT 84 (1975) (noting that these rights had been "elaborated by the generation of . . . Sidney, Milton, and above all John Locke in seventeenth-century England"); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985) (noting that the entitlement to property and liberty of which the Framers' generation was "so proud" was not really new, but was part and parcel of the historic "rights of Englishmen"). Locke had declared that government "cannot take from any Man any Part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property." John Locke, *Second Treatise of Government* ¶ 138, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

22 *See, e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 818-55 (1995).

23 *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 11 (2d ed. 1998).

24 *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 23 (4th ed. 1992) ("The theory is that the common law is best (not perfectly) explained as a system for maximizing the wealth of society.").

lands. Indeed, common law nuisance, together with private contract, might substitute for much of governmental land use regulation.[25] Here too, nuisance doctrine did not create intermediating, quasi-private institutions to enforce property rights. Affected neighbors sue to enjoin private nuisances and, when injury is widespread, local officials sue to enjoin what now are termed public nuisances. Although the Supreme Court has not been a paragon of consistency,[26] its rulings have not strayed from the unitary formulation: Land is owned by the individual and subject to the police power of the state.

B. *Zoning and the Police Power*

In Nelson's view, the merchants and affluent suburbanites who originally clamored for zoning regarded its public welfare justification as a "necessary camouflage" for a widespread redistribution of rights.[27] "Indeed, . . . there is no justification . . . for the coercive redistribution of property rights between municipalities and landowners that zoning accomplished. The whole scheme is a fraud of sorts."[28]

This argument is somewhat persuasive. The Supreme Court did give carte blanche to comprehensive land use regulation in 1926. The casualness of its opinion in *Village of Euclid v. Ambler Realty Co.*[29] does abet the notion of "camouflage." Clearly, whatever damage or danger could have resulted from the use of streets by heavy trucks, problems of fire prevention, contagion, lack of light and air, and other evils touched upon in *Euclid* could have been solved by means far less sweeping than comprehensive zoning.[30]

On the other hand, Nelson acknowledges that the creation of a "de

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25 *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 711-19 (1973).

26 *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134 n.30 (1978) (zoning based not "on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit"); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026-29 (1992) (indicating that where there is a total deprivation of economic enjoyment, the key is not the "harm" "benefit" distinction, but rather whether the landowner had a property right under "background principles" of state property and nuisance law).

27 *See* Nelson, *supra* note 3, at 841.

28 *Id.* at 846-47.

29 272 U.S. 365 (1926). The *Euclid* court noted:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.

Id. at 387-88.

30 *See* RICHARD A. EPSTEIN, TAKINGS 132-34 (1985).

facto property right was not the original intent" of zoning and that only experience demonstrated that "scientific planning" was "utopian."[31] "[I]n retrospect," he adds, "the nuisance law and planning justifications for zoning provided the necessary camouflage . . . to permit a fundamental land law innovation that was much more radical than the early advocates of zoning cared to admit."[32] If this is correct, it reminds us of Holmes' observation that the long-forgotten customs of a primitive time leave behind rules that eventually receive new content and enter upon a new career.[33]

Yet it would be a mistake to assume that advocates of land use planning acted solely out of Progressive idealism early in the century, or that they act solely to maximize aggregate pecuniary value now. Then, as now, broad movements result from mixed motives. For instance, George Sutherland, the Justice who wrote the *Euclid* opinion, was a social conservative who believed in the free market, supported some protective legislation, and had a record that "defies facile ideological categorization."[34] The *Euclid* opinion has been attributed to his overriding fear of overpopulation and of urban congestion[35] and to the "moral inclination, even among the conservative judges, to presume in favor of local regulations that are rooted in the genuine concerns of the police powers. For Sutherland, 'zoning' came to the Court with a momentum of respect, because it seemed to bear an obvious connection to the public health."[36]

Early comprehensive zoning legislation also could be seen as a classic public choice story.[37] "[M]arket forces provide strong incentives for politicians to enact laws that serve private rather than public interests' and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups."[38]

I have viewed the explosive growth of zoning as a "remarkable sociolegislative phenomenon."[39] Advocates included idealists and expounders of special interests who attributed the evils of city life to congestion, and also administrators, engineers, and lawyers who viewed zoning as confer-

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31 *See* Nelson, *supra* note 3, at 836-37.

32 *Id.* at 841.

33 OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Back Bay Books 1963) (1881).

34 Ellen Frankel Paul, *George Sutherland*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 848, 849 (Kermit L. Hall et al. eds., 1992).

35 *See* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND 126-27, 166, 242-43 (1951).

36 HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND 71 (1994).

37 The seminal works of public choice theory include KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951), ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957), and JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

38 Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986).

39 STEVEN J. EAGLE, REGULATORY TAKINGS § 5-3 (1996) (quotation omitted).

ring stability of uses and efficiency in the utilization of infrastructure.[40] Business interests were divided. While some local businesses favored continuing congestion, bankers, many merchants, and, above all, the real estate industry saw in zoning a source of profitable growth and stability of land values.[41] Organized uptown merchants constituted the key pressure group behind the landmark 1916 New York City zoning ordinance,[42] just as existing homeowners later constituted the key groups behind zoning in the suburbs.[43]

Justice Sutherland in *Euclid* made it clear that zoning did not permit the unlimited advancement of local residents over others.[44] As Nelson concedes, the original imposition of zoning was a simple exercise of sovereign power to coercively redistribute property rights in the neighborhood.[45] "[H]ad zoning been described accurately, the Supreme Court might have held it to be unconstitutional."[46] However, he adds, property rights evolve through "legal fictions and evasions,"[47] and privatization would "in many ways formally recognize and improve upon a process that has existed informally for many years."[48]

III. IS COMPULSORY "PRIVATIZATION" REALLY CONTRACTARIAN?

A. *Imposition of the Rule of Non-Unanimity*

It is crucial to observe that the essence of Nelson's privatization proposal is the imposition of the new regime upon non-consenting owners, who presumably prefer the status quo ante. There is a certain irony here—at the behest of interested parties the rule of contract would be imposed by force of law.

Owners of adjacent lands who wish to gain from the coordination of the use of their parcels could accomplish this through sale to a single owner, or through the mutual adoption of deed covenants. In either case, the result is Pareto efficient, since the parties have internalized both costs and benefits. It is not necessary that the state assess the bargain, since their

40 *See* Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, *in* ZONING AND THE AMERICAN DREAM 333, 339-40 (Charles M. Haar & Jerold S. Kayden eds., 1989).

41 *See id.* at 340-41.

42 *See* William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM, *supra* note 40, at 31.

43 *See* Ellickson, *supra* note 1.

44 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) ("It is not meant . . . to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.")

45 *See* Nelson, *supra* note 3, at 841.

46 *See id.*

47 *Id.* at 842 (quoting SIR FREDERICK POLLOCK, THE LAND LAWS 62 (1883)).

48 *Id.* at 841-42.

unanimity attests that none of the parties has lost in the exchange.[49] We know only that each party prefers the agreement to its alternatives and thereby has maximized value and minimized costs.[50]

Mainstream contractarians hold that "private ordering through contract is presumptively legitimate because it best serves their efficiency objective."[51] But there is another way of looking at the relationship. As Stephen Bainbridge notes: "For conservative contractarians, this is precisely backwards: we regard efficiency as a presumptively legitimate norm precisely because it best serves our preference for private ordering through contract."[52] For market conservatives, then, the issue is whether privatization of land use controls in existing neighborhoods maximizes value. For social conservatives, the question is whether it maximizes liberty.[53]

B. *Positive and Negative Liberty*

Just as there is no way to make omelets without breaking eggs, adherents of bigger government readily concede that "[t]aking or restricting [the] freedoms [of others] is, of course, . . . an unavoidable concomitant of creating legal 'rights.'"[54] Nelson does not distinguish traditional "negative rights," such as the landowners' traditional right to be left undisturbed, from "positive rights," which emphasize the creation of conditions under which some would thrive, but which place corresponding obligations upon others.[55]

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49 *See* James M. Buchanan, *Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost*, *in* ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY 161 (Robert D. Tollison & Viktor J. Vanberg eds., 1987).

50 *See* Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 966 n.12 (1996); *see also* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (asserting that wealth maximization is supported by the presumption of consent to efficient institutions).

51 David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 1, 23 (Lawrence E. Mitchell ed., 1995).

52 Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 895 n.199 (1997).

53 The belief that individual property ownership was vital to a culture of family self-reliance and liberty was most pronounced among the Southern Agrarians. *See, e.g.*, M.E. BRADFORD, REMEMBERING WHO WE ARE 86 (1985) ("[The Agrarian world was] pre- or non-capitalist *because* familial . . . for the Agrarians, the measure of any economic or political system was its human product. Goods, services, and income are, to this way of thinking, subsidiary to the basic cultural consideration, the overall form of life produced.").

54 *See, e.g.*, John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 816 n.32 (1993) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding guest's right to non-discriminatory service superior to motel owner's right to exclude)).

55 *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969) (discussing positive and negative liberty) and Gerald C. MacCallum, Jr., *Negative and Positive Free-*

In the 1960s and '70s, courts tried to "solve" the disparity of "bargaining power" between the typical urban landlord and tenant through a revolution that empowered tenants by mandating lease terms, which in effect relegated their relationship from contract back to status.[56] Similarly, Nelson's "collective property" rights relegate the objecting landowner to the status of association member. Even mandatory privatization schemes with much more modest objectives necessarily diminish individual rights.[57]

C. *The Problem of Subsidiarity*

One recurrent theme in Nelson's proposal is that cities should defer to the wishes of neighborhoods.[58] This theme is an application of a broader idea most cogently enunciated in the Catholic "principle of subsidiarity." As defined by Pius XI, it states that "it is an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies."[59]

In many respects, however, the plan would relegate decisions to larger and higher bodies. It would be not the city, but rather an agency of "the state" that would "serve as an overseer and mediator" in the negotiation process leading up to the approved privatization proposal. The state planning agency would have to decide if the "neighborhood's" boundaries were appropriate, if the proposed allocations of existing assets and tax revenues between the locality and the neighborhood association were fair, and if the land use powers permitted the association were reasonable. Furthermore, the state agency might well have to "mediate" (perhaps the better word is "arbitrate") not only the claims of the city and the original group of landowners, but also those of other landowner groups wanting to

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dom, 76 PHIL. REV. 312, 314 (1967) (posing the issue as "Is *x* free from *y* to do *z*?"). Under MacCallum's formulation, the question posed by Nelson becomes: "Are other residents, through their neighborhood association, free from the preexisting property rights of an objector to sell the objector's land or modify its use to enhance the collective well being of the owners of property in the neighborhood, as they have defined it?"

56 Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520 (1984) ("[M]ost of the changes were caused not by a deepening crisis in rental housing, but rather by social, political, and intellectual currents . . . ."). Perhaps the change more accurately could be termed "reactionary" than "radical," with the law retrogressing from an orientation stressing voluntary contracts entered into by free people to one meting out protections and responsibilities depending upon one's socioeconomic class. *See* HENRY MAINE, ANCIENT LAW 180-82 (Frederick Pollock ed., 10th ed. 1930) (1861) ("[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.").

57 *See* Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998) (advocating the creation of business improvement districts for the cleaning up and managing of business blocks).

58 *See* Nelson, *supra* note 3, at 839-42.

59 Pope Pius XI, Quadragesimo Anno (1931).

include some parcels in competing neighborhood associations. The state agency would have to supervise the one-year discussion process and ensuing election.[60] If a plan were approved, inevitably the state would have to deal with charges of collusive malfeasance involving association and municipal officials. Thus, the state agency likely would become an administrative tribunal adjudicating not only traditional land use regulations, but also the equivalent of lawsuits on covenants and shareholder derivative actions. This additional encouragement for statewide regulation would facilitate the activities of those types of interest groups that can organize easily on a statewide level to capture land use regulation.[61] Equally important, it would tend to diminish the incentive for competition among similar jurisdictions for residents by offering better services and lower taxes.[62] Such competition also serves as an important check on local exactions from existing landowners.[63]

IV. NON-UNANIMITY DESTROYS SUBJECTIVE VALUE

Given Nelson's assumption that transaction costs are prohibitive, neighborhood privatization requires that the right of a landowner to condition changes in the use of his parcel upon his consent is removed. In other words, the landowner's right becomes a "liability right" rather than a "property right."[64] Although Nelson does not stress or elaborate upon the point, the neighborhood association might have the literal power of eminent domain (if not outright ownership) over all private land in the neighborhood.

> [N]eighborhoods could sell rights of entry . . . , sell rights to make certain broader changes in land use . . ., or even sell all the neighborhood property in one package for comprehensive redevelopment.[65]

Just compensation would have to be paid if the land of a nonconsenting owner were to be sold by the neighborhood association, since it

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60 *See* Nelson, *supra* note 3, at 834.

61 *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971); *see also* ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY (1981).

62 *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); *see also* Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969) (demonstrating that local taxes and school expenditures resulted in comparable increases in property values, supporting the hypothesis that consumer behavior is rational).

63 *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991).

64 *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

65 Nelson, *supra* note 3, at 835.

would be regarded as an agent of the state in exercising its power.[66] However, given that the destruction of subjective value almost always occurs in eminent domain proceedings, "just compensation" is hardly ever "full compensation."[67] This point was recognized by the common law, which created the tort of "meliorating waste," in which the wrongdoer changes the nature of a parcel without decreasing its pecuniary value.[68] Even full pecuniary compensation by a UNA that combines a parcel with others and sells it would not suffice to make up the owner's loss. "The power to refuse to sell a right is a critical psychological component of ownership, and damages remedies do not include this power."[69]

A contrary argument could be made that the non-consenting landowner would benefit not only from the award of the fair market value of his own land, but also from his portion of the substantial additional value created by the relinquishment of the rights of others to object to development. Is this "reciprocity of advantage"[70] adequate compensation? Not under a subjective definition of value:

> Cost is that which the decision-maker sacrifices or gives up when he selects one alternative rather than another. Cost consists therefore in his own evaluation of the enjoyment or utility that he anticipates having to forgo as a result of choice itself.[71]

The problem with aggregating individual utility functions is a serious obstacle to ascertaining the utility of a group or the welfare of society as a whole.[72] It has been my view that the systematic destruction of subjective value is an important reason why the Fifth Amendment conditions the exercise of eminent domain not only upon the payment of "just compensation," but also upon satisfying the requirement that the taking be for "public use."[73] Although the Supreme Court's contemporary jurisprudence

66 *See* Reilly Tar & Chem. Corp. v. St. Louis Park, 121 N.W.2d 393 (Minn. 1963).

67 Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) (noting that because of "relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, [owners] value their property at more than its market value (i.e., it is not 'for sale')").

68 Melms v. Pabst Brewing Co., 79 N.W. 738, 739 (Wis. 1899).

69 Jeffrey J. Rachlinski & Forest Jourden, *Remedies and Psychology of Ownership*, 51 VAND. L. REV. 1541, 1542 (1998).

70 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Holmes, J.).

71 James M. Buchanan, *Introduction: L.S.E. Cost Theory in Retrospect*, *in* L.S.E. ESSAYS ON COST 1, 14-15, *quoted in* Zywicki, *supra* note 50, at 967.

72 *See* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 57 (1992) ("[T]o the extent that the term 'efficiency' refers to human satisfaction, it is incoherent or empty whenever a large number of people are involved.").

73 EAGLE, *supra* note 39, § 3-7(d). There is an extensive literature on whether the phrase "public use" should be read narrowly or broadly. *See, e.g.*, EPSTEIN, *supra* note 30, at 166-69 (public use limited to "public goods"); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (public use limited to situations where transaction costs preclude government procurement through free market). However, in recent decades a broader approach has predominated, requiring only a "public benefit." *See generally* Lawrence Berger, *The Public Use Requirement in Eminent Domain*,

makes the Public Use Clause a dead letter,[74] the enactment of state statutes along the lines of Nelson's proposal likely would cause considerable harm to non-consenting owners and would exacerbate the need for revival of this neglected Constitutional provision.

V. THE PROBLEM OF WEALTH MAXIMIZATION

A. *The Rhetoric of Reification*

The prologue to Nelson's proposal declares that "state governments [should] enact a new legal mechanism, making collective ownership of residential property available *to existing neighborhoods*."[75] Nothing seems more natural than the enhancement of collective rights when the owner of those rights is the collective. However, "neighborhoods" do not own property; individuals do, and they might or might not consider themselves "neighbors." While Nelson's introduction refers specifically to "residential neighborhoods," the proposal itself does not. Proposals for privatization may be made by a "group of individual property owners in an existing neighborhood," and the state would certify whether the "proposed neighborhood met certain standards of reasonableness."[76] It is unclear whether the "neighborhood" would have to be purely residential, or whether it could be mixed or heavily commercial.

Inspired by Humpty Dumpty,[77] we may as individuals define the word "neighborhood" as we like. In everyday speech, the term "community" has come to have different and partly contradictory meanings, ranging from social solidarity[78] to interest group politics.[79] Likewise, "neighborhood" might refer to the area in which individuals share a common elementary school and block parties or to the area from which maximum returns would accrue to the organizers of a UNA.

For the purpose of approving privatization petitions, "neighborhood" would have to be defined by state agencies or the judiciary. Given the

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57 OR. L. REV. 205 (1978).

74 *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) (declaring the public use requirement "coterminous with the scope of a sovereign's police powers").

75 *See* Nelson, *supra* note 3, at 833 (emphasis added).

76 *Id.*

77 *See* LEWIS CARROL, THROUGH THE LOOKING GLASS 205 (C.L. Dodgson ed., 1934) ("'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'").

78 Note the term's roots in the Latin *communitas*, fellowship. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992).

79 *Id.* An increasingly common usage refers to "the environmental community," "the international business community," the "aerospace community," and the like.

problems that these institutions have had in defining less complex concepts such as "relevant market" in antitrust,[80] the task seems daunting.

B. *"Market Failure" and State Intervention*

Nelson's basic criticisms of zoning are that it is insufficiently rigorous and reactive. Zoning does not regulate property owners' "architecture, trees and shrubbery, yard maintenance" and the like as residential community associations do.[81] Also, while zoning "serves many neighborhoods well as a protective instrument" for maintaining neighborhood character, it "fails wherever the objective is the transition from one type of use to another."[82]

> [T]he ability to sell zoning allows the neighborhood to manage a transition to a *different* use of the neighborhood. Currently, because an entity outside the neighborhood controls changes in land use under zoning, and because these changes often do not bring financial gains to the neighborhood collectively (and may involve losses for some individuals), the residents of existing neighborhoods typically resist almost all land use change.[83]

If only the state would eliminate market failure in the form of the "prohibitive" transaction costs in "assembling unanimous neighborhood consents," he intimates, these goals could be realized.[84] It is useful to examine some of the contexts in which alleged "market failures" might justify Nelson's remedy.

C. *Mimicking the Market, or Mimicking the State?*

Nelson says of traditional zoning: "Nothing in American legal and policy traditions justified such a coercive government redistribution of residential private property rights within neighborhoods."[85] Yet, under his proposal almost twenty-five percent of landowners could object to privatization and still be subjected to it. Their lands, like those of their consenting neighbors, could be sold "in one package for comprehensive redevelopment."[86]

In this sense, the UNA seems remarkably similar to the public urban renewal agency activity considered in *Berman v. Parker*.[87] There, Justice Douglas opined that if the condemnation of a perfectly sound building

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80 *See* Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806-07 (1990).

81 *See* Nelson, *supra* note 3, at 835.

82 *Id.* at 836.

83 *Id.*

84 *Id.* at 833.

85 *Id.* at 841.

86 *Id.* at 835.

87 348 U.S. 26, 31-34 (1954).

within an urban renewal area was "in harmony with the overall plan," the owner had no legitimate complaint.[88] Likewise, the UNA rationale seems consistent with the condemnation of a thriving ethnic neighborhood that was the subject of *Poletown Neighborhood Council v. City of Detroit*,[89] in which "the destruction of roots, relationships, solidarity, sense of place, and shared memory" never was confronted.[90]

D. *Opportunities for Rent Seeking Would Abound*

Nelson notes that traditional zoning leaves neighborhoods open to the "substantial influence" of "outsiders."[91] This notation is correct, but the underlying problem is apt to be exacerbated by mandatory privatization, since the new statutory regime would establish a haven for rent seeking.[92]

While one might get the impression that UNAs would be organized by natural leaders who would emerge from neighborhood barbecues and bake sales, in many instances groups of sophisticated owners and investors would try to devise "neighborhoods" with commercial development potential in which they would have title to, or options to buy, valuable parcels. They could also custom-tailor "neighborhoods" to maximize the value of their holdings and to freeze out competing organizing groups. With no unified opposition, they could submit a privatization proposal and heavily influence its consideration. Once they gain the approval of seventy-five percent of owners with ninety percent of market value, they could sell services to the association through affiliates, or, for that matter, could sell the neighborhood to an affiliate. While Gordon Tullock explained that "there are only transitional gains to be made when the government establishes privileges for a group of people,"[93] those gains might be large indeed.

This problem need not be insurmountable. However, as the experience of trying to deal with a developer overreaching through several generations of condominium statutes informs us,[94] it is a difficult one.

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88 *Id.* at 34.

89 304 N.W.2d 455 (Mich. 1981) (upholding on grounds of job creation, the condemnation and leveling of an enclave of 1,400 homes, schools, 16 churches, and 144 local businesses so that the land could be transferred to General Motors as a Cadillac assembly plant site).

90 MARY ANN GLENDON, RIGHTS TALK 30 (1991).

91 *See* Nelson, *supra* note 3, at 835.

92 "Rents" are payments to owners of resources in excess of their opportunity costs. The classic example is raw land, which was not brought into being by the inducement of the payment. The concept was developed by Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967), and the specific term "rent seeking" was coined by Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

93 Gordon Tullock, *Rent Seeking*, *in* PROPERTY RIGHTS AND THE LIMITS OF DEMOCRACY 66 (Charles K. Rowley ed., 1993).

94 *See, e.g.*, Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495 (1997).

E. *The "Fatal Conceit"*

Finally, what appear to be illogical holdouts and idiosyncratic behaviors may have a meaning not immediately ascertainable to planners, whether they are motivated by ideology or by efficiency.[95] Short-circuiting this process deprives planners of the very information that they need to plan properly.[96] The temptation to "improve" the situation of property owners, without their consent, may be another example of an old but fatal conceit.[97]

VI. THE LINGERING SPECTRE OF GOVERNMENTAL REGULATION

Government cannot sell the police power,[98] and it is unlikely that UNAs would be left undisturbed. UNA activities might be regarded as state action and the use of acquisition powers deemed the exercise of eminent domain.[99] The association might be subject to other regulatory takings actions. The touchstone is that the legislative grant of the power of eminent domain to a private corporation or group is predicated upon the recipient's exercise of the power for public purposes.[100] The result might be that the borrowing of sovereign powers, intended to permit the UNA to go its own way, ties it closer to the state.

A large measure of the autonomy permitted RCAs stems from the fact that courts have been less inclined to scrutinize a residential association's activities for "reasonableness" because its members "unanimously consent to the provisions in the association's original governing documents."[101] The California Supreme Court provided a similar rationale when it recently upheld the plenary authority of RCA rules in *Nahrstedt v. Lakeside Village Condominium Ass'n.*[102] It noted that "owners associations 'can be a powerful force for good or for ill,'"[103] and those who buy with knowledge

95 *See* F.A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER, chs. 7-9 (1948) (noting that the free market produces order by organizing "chaotic" information in coherent patterns).

96 *See* Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, *in* COLLECTIVIST ECONOMIC PLANNING (F.A. Hayek ed., 1935).

97 *See* F. A. HAYEK, THE FATAL CONCEIT 27 (1988).

98 *See, e.g.*, Carlino v. Whitpain Investors, 453 A.2d 1385, 1388 (Pa. 1982) ("Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.").

99 *See supra* text accompanying note 66.

100 *See* DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 80.02(b)(2) (1994 & Supp. 1996) (collecting cases).

101 Robert C. Ellickson, *Cities and Homeowners' Associations*, 130 U. PA. L. REV. 1519, 1526-27 (1982).

102 878 P.2d 1275 (Cal. 1994).

103 *Id.* at 1282 (quoting Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 43 (1990)).

of their powers "accept 'the risk that the power may be used in a way that benefits the commonality but harms the individual.'"[104] If a neighborhood association is not formed on the principle of consent, courts would be less inclined to give it the benefit of the doubt on a wide range of matters.

In addition, of course, there will be many potential conflicts between governmental officials and energized neighborhood associations that do not involve consent. Many attempts by associations to maximize the value of their holdings will significantly affect adjoining areas. Plans to build stadia or large office complexes might create regional infrastructure problems. Enticing a large upper-middle-class population might cause school crowding or call forth countermeasures to fight "gentrification."

A broader reason for governmental intervention is the deep concern, shared by social conservatives as well as modern liberals, that land use and community are too important to leave to the market.[105] Already residential community associations are being scrutinized in this light.[106] Furthermore, there may be long-term cycles in governmental land use regulation whereby the rights of landowners and powers of regulators alternate in ascendancy.[107] Just as state "regulation of [local] regulators" in part targets "externalities that local regulation might create,"[108] state regulations may be expected to grow to meet perceived externalities brought about by neighborhood associations.

The powers of RCAs are under intense attack from those who do not believe that membership is truly "voluntary,"[109] and from those who are not sure if the presence of consent is important.[110] Nelson seems to give

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104 *Id.* (quoting Natelson, *supra* note 103, at 47).

105 The destructive effects of markets in land on established communal life were articulated in KARL POLANYI, THE GREAT TRANSFORMATION (1944); *see also* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1375-78 (1993).

106 *See, e.g.*, Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989); Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call"*, 30 VAL. U. L. REV. 509 (1996). *See also* Robert Reich, *Secession of the Successful*, N.Y. TIMES MAG., Jan. 20, 1991, at 42.

107 *See* Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence–An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990).

108 *Id.* at 591.

109 *See, e.g.*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1884 n.131 (1994). In particular, Ford has noted:

> The fetishism of origins that characterizes the contractarian notion of association is ill-suited to a spatial context in which the original 'contract' affects individuals distant from the agreement in both space and time (nonparties include both those who were not privy to the contract because they were excluded at the time it was made and those who, upon entering the association at a later time, find themselves subject to a contract not of their making). It is this feature that makes the association's rules more like a government than a private contract."

Id.

110 *See, e.g.*, Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. Rev. 273, 274 (1997) ("Although the contract argument against judicial intervention in community association decisions has considerable force, it is not a show-stopper.").

ammunition to these sharp critics by providing for explicit lack of consent at the start. He does his cause no good by declaring that "this distinction [between voluntary and involuntary membership] may be difficult to sustain," and immediately continuing:

> Rather, as suggested above, perhaps the best explanation for the difference between "public" and "private" is that these terms today create different legal and cultural expectations with respect to the permissible elements of a local constitution and the allowable procedures for a constitutional amendment.[111]

In an era where not all "cultural expectations" are friendly towards private property rights, the UNA may be something other than a fine-tuning of neighborhood governance. Straddling as it does the boundary between private and governmental, the UNA might in the long run be inimitable to both private property and to individual liberty.

111 *See* Nelson, *supra* note 3, at 862.